would be true for other "non-cable" service revenues.[332] Thus, Internet access services, including broadband data services, and any other non-cable services are not subject to "cable services" fees.

99. Charges incidental to the awarding or enforcing of a franchise. Section 622(g)(2)(D) excludes from the term "franchise fee" "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."[333] Such "incidental" requirements or charges may be assessed by a franchising authority without counting toward the 5 percent cap. A number of parties assert, and seek Commission clarification, that certain types of payments being requested in the franchise process are not incidental fees under Section 622(g)(2)(D) but instead must either be prohibited or counted toward the cap.[334] Furthermore, a number of parties report that disputes over such issues as well as unreasonable demands being made by some franchising authorities in this regard may be leading to delays in the franchising process as well as unreasonable refusals to award competitive franchises. We therefore determine that non-incidental franchise-related costs required by LFAs must count toward the 5 percent franchise fee cap and provide guidance as to what constitutes such non-incidental franchise-related costs. Under the Act, these costs combined with other franchise fees cannot exceed 5 percent of gross revenues for cable service.

100. BellSouth urges us to prohibit franchising authorities from assessing fees that the authorities claim are "incidental" if those fees are not specifically allowed under Section 622 of the Cable Act.[335] BellSouth asserts that LFAs often seek fees beyond the 5 percent franchise fee allowed by the statutory provision. The company therefore asks us to clarify that any costs that an LFA requires a cable provider to pay beyond the exceptions listed in Section 622 – including generally applicable taxes, PEG capital costs, and "incidental charges" – count toward the 5 percent cap.[336] OPASTCO asserts that higher fees discourage investment and often will need to be passed on to consumers.[337] Verizon also requests that we clarify that fees that exceed the cap are unreasonable.[338]

101. AT&T argues that we should find unreasonable any fees or contribution requirements that are not credited toward the franchise fee obligation.[339] AT&T also asserts that any financial obligation to the franchising authority that a provider undertakes, such as application or acceptance fees

(Continued from previous page)
2003), *rev'd, NCTA v. Brand X*, 545 U.S. 967 (2005). The Commission issued a notice of proposed rulemaking ("*Cable Modem NPRM*") concurrently with the *Cable Modem Declaratory Ruling.* Certain questions from the *Cable Modem NPRM* that are relevant, but not directly related, to this discussion remain pending before the Commission. *Cable Modem Declaratory Ruling* at 4839-4854.

[332] *See* NATOA Reply at 29 (agreeing that non-cable services are not subject to franchise fees).

[333] 47 U.S.C. § 542(g)(2)(D).

[334] AT&T Comments at 65-67; BellSouth Comments at 7, 38-39.

[335] BellSouth Comments at 7.

[336] BellSouth Comments at 38-39.

[337] OPASTCO Reply at 5.

[338] Verizon Reply at 59.

[339] AT&T Comments at 64.

that exceed the reasonable cost of processing an application, free or discounted service to an LFA, and LFA attorney or consultant fees, should apply toward the franchise fee obligation.[340]

102. Conversely, NATOA asserts that costs such as those enumerated above by AT&T fall within Section 622(g)(2)(D)'s definition of charges "incidental" to granting the franchise.[341] NATOA contends that the word "incidental" does not refer to the ***amount*** of the charge, but rather the fact that a charge is "naturally appertaining" to the grant of a franchise. Thus, NATOA argues, these costs are not part of the franchise fee and therefore do not count toward the cap.[342]

103. There is nothing in the text of the statute or the legislative history to suggest that Congress intended the list of exceptions in Section 622(g)(2)(D) to include the myriad additional expenses that some LFAs argue are "incidental."[343] Given that the lack of clarity on this issue may hinder competitive deployment and lead to unreasonable refusals to award competitive franchises under Section 621, we seek to provide guidance as to what is "incidental" for a new competitive application?" We find that the term "incidental" in Section 622(g)(2)(D) should be limited to the list **of** incidentals in the statutory provision, as well as other minor expenses, as described below. We find instructive a series of federal court decisions relating to this subsection of Section 622. These courts have indicated that (i) there are significant limits on what payments qualify as "incidental" and may be requested outside of the 5 percent fee limitation; and (ii) processing fees, consultant fees, and attorney fees are not necessarily to be regarded as "incidental" to the awarding **of** a franchise?" In *Robin Cable Systems v. City of Sierra Vista,* for example, the United States District Court for the District of Arizona held that "processing costs" of up to $30,000 required as part of the award **of** a franchise were not excluded under subsection (g)(2)(D) because they were not "incidental," but rather "substantial" and therefore "inconsistent with the Cable Act."[346] Additionally, in *Time Warner Entertainment v. Briggs,* the United States District Court for the District of Massachusetts decided that attorney fees and consultant fees fall within the definition of franchise fees, **as** defined in Section 622. Because the municipality in that case was already collecting **5** percent of the operator's gross revenues, the Court determined that a franchise provision requiring the cable operator to pay such fees above and beyond its **5** percent gross revenues was preempted and therefore unenforceable.[347] Finally, in *Birmingham Cable Comm. v. City of Birmingham,* the United States District for the Northern District of Alabama stated that "it would be an aberrant construction of

[340] AT&T Comments at **65-67**

[341] NATOA Reply at 34-35

[342] NATOA Reply at 35 (citing Random House Dictionary of the English Language at 720).

[343] ***See*** *infra* paras. 105-108.

[344] NATOA argues that the Commission is powerless to rewrite the meaning of the statute. NATOA Reply at 35. Yet, Section 622(i) states "[a]ny Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, *except as provided* ***in this section."*** Therefore, we are within our Congressionally mandated authority to provide clarifying guidance regarding the meaning of this provision.

[345] ***See*** Robin Cable *Systems v. City of Sierra Vista,* **842** F. Supp. 380 (D. Ariz. 1993); *Time Warner Entertainment Co. v. Briggs,* 1993 WL 23710 (D. Mass. Jan. 14, 1993); *Birmingham Cable Comm.* v. ***City*** *of Birmingham,* 1989 WL **253850** (N.D. Ala. 1989).

[346] *Robin* Cable at 381.

[347] *Time Warner* at 23710 * 6.

the phrase 'incidental to the awarding ... of the franchise,' in this context, to conclude that the phrase embraces consultant fees incurred solely by the City."[348]

104. We find these decisions instructive and emphasize that LFAs must count such non-incidental franchise-related costs toward the cap. We agree with these judicial decisions that non-incidental costs include the items discussed above, such as attorney fees and consultant fees, but may include other items, as well. Examples of other items include application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments as discussed below. Accordingly, if LFAs continue to request the provision of such in-kind services and the reimbursement of franchise-related costs, the value of such costs and services should count towards the provider's franchise fee payments.[349] For future guidance, LFAs and video service providers may look to judicial cases to determine other costs that should be considered "incidental."

105. In-kind payments unrelated to provision of cable service. The record indicates that in the context of some franchise negotiations, LFAs have demanded from new entrants payments or in-kind contributions that are unrelated to the provision of cable services. While many parties argue that franchising authority requirements unrelated to the provision of cable services are unreasonable,[350] few parties provided specific details surrounding the in-kind payment demands of LFAs.[351] As discussed further below, most parties generally discussed examples of concessions, but were unwilling to provide details of specific instances, including the identity of the LFA requesting the unrelated services?" Even without specific details concerning the LFAs involved, however, the record adequately supports a finding that LFA requests unrelated to the provision of cable services have a negative impact on the entry of new cable competitors in terms of timing and costs and may lead to unreasonable refusals to award competitive franchises. Accordingly, we clarify that any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap.

106. The Broadband Service Providers Association states that an example of a municipal capital requirement can include traffic light control systems.[353] FTTH Council states that non-video requirements raise the cost of entry for new entrants and should be prohibited?" As an example, FTTH

[348] ***Birmingham*** at 253850.

[349] To the extent that an LFA requires franchise fee payments of less than 5 percent an offset may not be necessary. Such LFAs are able to request the reimbursement or provision of such costs up to the 5 percent statutory threshold.

[350] Alcatel Comments at 10; FTTH Council Comments at 36; OPASTCO Reply at 4; USTelecom Comments at 48; BPSA Comments at 8; NTCA Comments at 13; South Slope Comments at 15. ***See also*** DOJ *Ex Parte* at 11.

[351] Some LFAs argue that commenters' allegations about inappropriate fees fail to identify the LFAs in question. As a consequence, they contend, we should not rely on such unsubstantiated claims unless the particular LFAs in question are given a chance to respond. Communications Support Group Reply at 7; Anne Arundel County Reply at 5. We need not resolve particular disputes between parties, however, in order to address this issue. Our clarification that all LFA requests not related to cable services must be counted toward the 5 percent cap is a matter of statutory construction, and all commenters have had ample opportunity to address this issue.

[352] Broadband Service Providers Association Comments at 8; AT&T Comments at 26; Verizon Comments at 57-58. Parties have indicated that they were unwilling to identify specific instances of unreasonable requests, since in many cases these parties are still trying to negotiate franchise agreements with the communities at issue.

[353] Broadband Service Providers Association Comments at 8.

[354] FTTH Council Comments at 66.

Council asserts that in San Antonio, Grande Communications was required to prepay $1 million in franchise fees (which took the company five years to draw down) and to fund a $50,000 scholarship, with an additional $7,200 to be contributed each year. They assert that new entrants agree to these requirements because they have no alternative.[355] The National Telecommunications Cooperative Association ("NTCA") also asserts that its members have complained that LFAs require them to accept franchise terms unrelated to the provision of video service.[356] NTCA states that any incumbent cable operator that already abides by such a requirement has made the concession in exchange for an exclusive franchise, but that new entrants, in contrast, must fight for every subscriber and will not survive if forced into expensive non-video related projects.'"

107. AT&T refers to a press article stating that Verizon has faced myriad requests unrelated to the provision of cable service. These include: a $13 million "wish list" in Tampa, Florida; a request for video hookup for a Christmas celebration and money for wildflower seeds in New York; and a request for fiber on traffic lights to monitor traffic in Virginia.)" Verizon provides little additional information about these examples, but argues that any requests must be considered franchise-related costs subject to the 5 percent franchise fee cap, as discussed above.[359]

108. We clarify that any requests made by LFAs unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap, as discussed above. Municipal projects unrelated to the provision of cable service do not fall within any of the exempted categories in Section 622(g)(2) of the Act and thus should be considered a "franchise fee" under Section 622(g)(1). The legislative history of the 1984 Cable Act supports this finding, providing that "lump sum grants not related to PEG access for municipal programs such as libraries, recreation departments, detention centers or other payments not related to PEG access would be subject to the 5 percent limitation."[360] Accordingly, any such requests for municipal projects will count towards the 5 percent cap.

109. Contributions in support of PEG services and equipment. As further discussed in the Section below, we also consider the question of the proper treatment of LFA-mandated contributions in support of PEG services and equipment. The record reflects that disputes regarding such contributions are impeding video deployment and may be leading to unreasonable refusals to award competitive franchises.[361] Section 622(g)(2)(C) excludes from the term "franchise fee" any "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities."[362] Accordingly, payments of this type, if collected only for the cost of building PEG facilities, are not subject to the 5 percent limit. Capital costs refer to those costs incurred in or associated

[355] *Id.* at 38.

[356] NTCA Comments at 4.

[357] NTCA Comments at 13.

[358] AT&T Comments at 26 (citing Dionne Searcey, *As Verizon Enters Cable Business, it Faces Local Static,* WALL ST. J., Oct. 28, 2005, at A1). *See also* City of Tampa Reply Comments at 5.

[359] Verizon Comments at 54. See *also* USTelecom Comments at 48.

[360] H.R. REP. NO. 98-934, at 65 (1984), as *reprinted in* 1984 U.S.C.C.A.N. 4655,4702.

[361] *See, e.g.*, FTTH Council Comments at 36 (noting how Knology declined to enter the Louisville market after the Louisville LFA requested a PEG grant of $266,000 at the time of franchise grant, with $1.9 million total due over the 15-yearterm).

[362] 47 U.S.C. § 542(g)(2)(C)

with the construction of PEG access facilities.[363] These costs are distinct from payments in support of the use of PEG access facilities. PEG support payments may include, but are not limited to, salaries and training. Payments made in support of PEG access facilities are considered franchise fees and are subject to the 5 percent cap.[364] While Section 622(g)(2)(B) excluded from the term franchise fee any such payments made in support of PEG facilities, it only applies to any franchise in effect on the date of enactment.[365] Thus, for any franchise granted after 1984, this exemption from franchise fees no longer applies.

4. PEG/Institutional Networks

110. In the *Local Franchising NPRM*, we tentatively concluded that it is not unreasonable for an LFA, in awarding a franchise, to "require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capaci facilities, or financial support"[366] because this promotes important statutory and public policy goals?' However, pursuant to Section 621(a)(1), we conclude that LFAs may not make unreasonable demands of competitive applicants for PEG and I-Net[3]" and that conditioning the award of a competitive franchise on applicants agreeing to such unreasonable demands constitutes an unreasonable refusal to award a franchise. This finding is limited to competitive applicants under Section 621(a)(1). Yet, as this issue is also germane to existing franchisees, we ask for further comment on the applicability of this and other findings in the *Further Notice of Proposed Rulemaking* attached hereto. The FNPRM tentatively concludes that the findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs.

111. As an initial matter, we conclude that we have the authority to address issues relating to PEG and I-Net support.[369] Some commenters argue that Congress explicitly granted the responsibility for PEG and I-Net regulation to state and local governments.[370] For example, NATOA contends that we cannot limit the in-kind or monetary support that LFAs may request for PEG access, because Sections 624(a) and (b) allow an LFA to establish requirements "related to the establishment and operation of a cable system," including facilities and equipment.[371] In response, Verizon claims that PEG requirements should extend only to channel capacity, and that LFAs can obtain other contributions only to the extent

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[363] *See* H.R. REP. NO. 98-934, at 19 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655,4656.

[364] *See Cable TV Fund 14-A v. City of Naperville,* 1997 WL 433628 (N.D. Ill. 1997) at 13; *City of Bowie, Maryland,* 14 FCC Rcd. 7675 (Cable Service Bureau, 1999); as *clarified* 14 FCC Rcd 9596 (Cable Services Bureau, 1999).

[365] 47 U.S.C. § 542(g)(2)(B).

[366] 47 U.S.C. § 541(a)(4)(B).

[367] *Local Franchising NPRM, 20* FCC Rcd at 18590

[368] An I-Net is defined as "a communication network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential customers." 47 U.S.C. § 531(f).

[169] *See infra* Section III.B.2

[370] NATOA Comments at 35; NATOA Reply at 30-31; Hawaii Reply at 2-3; Mercatus Comments at 35; Certain Florida Municipalities Comments at 17-18; Anne Arundel *et ai* Comments at 35; City of New York Comments at 3-4.

[371] NATOA Reply at 30 (quoting 47 U.S.C. § 544(b)).

that they are agreed to voluntarily by the cable operator.[372] Verizon also asserts that the record confirms that LFAs often demand PEG support that exceeds statutory limits.[373]

112. Section 611(a) of the Communications Act operates as a restriction on the authority of the franchising authority to establish channel capacity requirements for PEG. This Section provides that "[a] franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section."[374] Section 611(b) allows a franchising authority to require that "channel capacity be designated for public, educational or governmental use," but the extent of such channel capacity is not defined."[375] Section 621(a)(4)(b) provides that a franchising authority may require "adequate assurance" that the cable operator will provide "adequate" PEG access channel capacity, facilities, or financial support."[376] Because the statute does not define the term "adequate," we have the authority to interpret what Congress meant by "adequate PEG access channel capacity, facilities, and financial support," and to prohibit excessive LFA demands in this area, if necessary. We note that the legislative history does not define "adequate," nor does it provide any guidance as to what Congress meant by the term.[377] We therefore conclude that "adequate" should be given its plain meaning: the term does not mean significant but rather "satisfactory or sufficient."[378] As discussed above, we have also accepted the tentative conclusion of the *Local Franchising NPRM* that Section 621(a)(1) prohibits not only the ultimate refusal to award a competitive franchise, but also the establishment of procedures and other requirements that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise. Given this conclusion and our authority to interpret the term "adequate" in Section 621(a)(4), we will provide guidance as to what constitutes "adequate" PEG support under that provision as subject to the constraints of the "reasonableness" requirement in Section 621(a)(1).

113. AT&T asserts that we should shorten the period for franchise negotiations by adopting standard terms for PEG channels.[379] We reject this suggestion and clarify that LFAs are free to establish their own requirements for PEG to the extent discussed herein, provided that the non-capital costs of such requirements are offset from the cable operator's franchise fee payments. This is consistent with the Act and the historic management of PEG requirements by LFAs.[380]

114. Consumers for Cable Choice and Verizon argue that it is unreasonable for an LFA to request a number of PEG channels from a new entrant that is greater than the number of channels that the community is using at the time the new entrant submits its franchise application.[381] We find that it is

[372] Verizon Reply at 60-61.

[373] Verizon Reply at 60 (citing NATOA Comments).

[374] 47 U.S.C. § 531(a).

[375] 47 U.S.C. § 531(b).

[376] 47 U.S.C. § 541(a)(4)(B).

[377] *See See* H.R. REP. NO. 102-862, at 78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1260.

[378] American Heritage Dictionary, Second College Edition (1991).

[379] AT&T Reply at 15.

[380] *See* 47 U.S.C. § 541(a)(4)(B); *Time Warner Cable of New York City v. City of New York*, 943 F.Supp. 1357, 1367 (S.D.N.Y 1996), *affd sub nom. Time Warner Cable of New York City v. Bloomberg, L.P.*, 118 F.3d 911 (2nd Cir. 1997).

[381] Consumers for Cable Choice Comments at 8; Verizon Comments at 71.

unreasonable for an LFA to impose on a new entrant more burdensome PEG carriage obligations than it has imposed upon the incumbent cable operator.

115. Some commenters also asked whether certain requirements regarding construction or financial support of PEG facilities and I-Nets are unreasonable under Section 621(a)(1). Several parties indicate that, as a general matter, PEG contributions should be limited to what is "reasonable" to support "adequate" facilities.[382] We agree that PEG support required by an LFA in exchange for granting a new entrant a franchise should be both adequate and reasonable, as discussed above. In addressing each of these concerns below, we seek to strike the necessary balance between the two statutory terms.

116. Ad Hoc Telecom Manufacturers argue that it is unreasonable to require the payment of ongoing costs to operate PEG channels, because a requirement is unrelated to right-of-way management, the fundamental policy rationale for an LFA's franchising authority.[383] In response, Cablevision asserts that exempting incumbent LECs from PEG support requirements would undermine the key localism features of franchise requirements, and could undermine the ability of incumbent cable operators to provide robust community access.[384] We disagree with Ad Hoc Telecom Manufacturers that it is per *se* unreasonable for LFAs to require the payment of ongoing costs to support PEG. Such a ruling would be contrary to Section 621(a)(4)(B) and public policy. We note, however, that any ongoing LFA-required PEG support costs are subject to the franchise fee cap, as discussed above.

117. FTTH Council, Verizon, and AT&T ask us to affirm that PEG or I-Net requirements imposed on a new entrant that are wholly duplicative of existing requirements imposed on the incumbent cable operator are *per se* unreasonable.[385] AT&T and Verizon argue that Section 621(a)(4)(B) requires adequate facilities, not duplicative facilities.[386] FTTH Council contends that if LFAs can require duplicative facilities, they can burden new entrants with inefficient obligations without increasing the benefit to the public."[387] FTTH Council thus suggests that LFAs be precluded from imposing completely duplicative requirements, and that we require new entrants to contribute a pro rata share of the incumbent cable operator's PEG obligations. For example, if an incumbent cable operator funds a PEG studio, the new entrant should be required to contribute a pro rata share of the ongoing financial obligation for such studio, based on the new entrant's number of subscribers.[388]

118. In addition to advocating a pro *rata* contribution rule, FTTH Council requests that we require incumbents to permit new entrants to connect with the incumbent's pre-existing PEG channel feeds.[389] FTTH Council proposes that the incumbent cable operator and new entrant decide how to accomplish this connection, with LFA involvement if necessary, and that the costs of the connection should be deducted from the new entrant's PEG-related financial obligations to the LFA.[390] Others agree that PEG interconnection is necessary to maximize the value of local access channels when more than one

[382] BellSouth Comments at 8; Verizon Comments at 71.

[383] Ad Hoc Telecom Manufacturer Coalition Comments at 4.

[384] Cablevision Reply at 29-30.

[385] FTTH Council Comments at 66; Verizon Comments at 71; AT&T Comments at 61.

[386] AT&T Comments at 67-68; Verizon Reply at 61.

[387] FTTH Council Comments at 67.

[388] *Id.*

[389] *Id.*

[390] *Id.*

video provider operates in a community.[391] New entrants seek a ***pro rata*** contribution rule based on practical constraints as well. AT&T asserts that, although incumbent cable operators can provide space for PEG in local headend buildings, LEC new entrants' facilities are not designed to accommodate those needs. Thus, if duplicative facilities are demanded, new entrants would have to build or rent facilities solely for this purpose, which AT&T contends would be unreasonable under the statute."[392] NATOA counters that AT&T's complaint regarding space mischaracterizes PEG studio requirements that exist in some franchises.[393] Specifically, NATOA claims that LFAs generally are not concerned with a PEG studio's location, and that PEG studios are usually located near cable headends simply because those locations reduce the cable operators' costs.[394]

119. We agree with AT&T, FTTH Council, Verizon, and others that completely duplicative PEG and I-Net requirements imposed by LFAs would be unreasonable.[395] Such duplication generally would be inefficient and would provide minimal additional benefits to the public, unless it was required to address an LFA's particular concern regarding redundancy needed for, for example, public safety. We clarify that an I-Net requirement is not duplicative if it would provide additional capability or functionality, beyond that provided by existing I-Net facilities. We note, however, that we would expect an LFA to consider whether a competitive franchisee can provide such additional functionality by providing financial support or actual equipment to supplement existing I-Net facilities, rather than by constructing new I-Net facilities. Finally, we find that it is unreasonable for an LFA to refuse to award a competitive franchise unless the applicant agrees to pay the face value of an I-Net that will not be constructed. Payment for I-Nets that ultimately are not constructed are unreasonable as they do not serve their intended purpose.

120. While we prefer that LFAs and new entrants negotiate reasonable PEG obligations, we find that under Section 621 it is unreasonable for an LFA to require a new entrant to provide PEG support that is in excess ***of*** the incumbent cable operator's obligations. We also agree that a pro ***rata*** cost sharing approach is one reasonable means of meeting the statutory requirement of the provision of adequate PEG facilities. To the extent that a new entrant agrees to share pro ***rata*** costs with the incumbent cable operator, such an arrangement is ***per se*** reasonable.[396]

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[391] Communications Support Group, Inc. Reply at 12

[392] AT&T Comments at 70.

[393] NATOA Reply at 41-42.

[394] NATOA Reply at 42.

[395] If a new entrant, for technical, fmancial, or other reasons, is unable to interconnect with the incumbent cable operator's facilities, it would not be unreasonable for an LFA to require the new entrant to assume the responsibility of providing comparable facilities, subject to the limitations discussed herein.

[396] To determine a new entrant's ***per se*** reasonable PEG support payment, the new entrant should determine the incumbent cable operator's per subscriber payment at the time the competitive applicant applies for a franchise or submits its informational filing, and then calculate the proportionate fee based on its subscriber base. A new entrant may agree to provide PEG support over and above the incumbent cable operator's existing obligations, but such support is at the entrant's discretion. If the new entrant agrees to share the ***pro rata*** costs with the incumbent cable operator, the PEG programming provider, be it the incumbent cable operator, the LFA, or a thiid-party programmer, must allow the new entrant to interconnect with the existing PEG feeds. The costs of such interconnection should be borne by the new entrant. We note that we previously have required cost-sharing and interconnection for PEG channels and facilities in another context. Section 75.1505(d) of the Commission's rules requires that if an LFA and OVS operator cannot reach an agreement on the OVS operator's PEG obligations, the operator is required to match the incumbent cable operator's PEG obligations and the incumbent cable operator is required to permit the **OVS** (continued...)

5. Regulation of Mixed-Use Networks

121. We clarify that LFAs' jurisdiction applies only to the provision of cable services over cable systems. To the extent a cable operator provides non-cable services and/or operates facilities that do not qualify as a cable system, it is unreasonable for an LFA to refuse to award a franchise based on issues related to such services or facilities. For example, we find it unreasonable for an LFA to refuse to grant a cable franchise to an applicant for resisting an LFA's demands for regulatory control over non-cable services or facilities.[397] Similarly, an LFA has no authority to insist on an entity obtaining a separate cable franchise in order to upgrade non-cable facilities. For example, assuming an entity (*e.g.*, a LEC) already possesses authority to access the public rights-of-way, an LFA may not require the LEC to obtain a franchise solely for the purpose of upgrading its network.[398] So long as there is a non-cable purpose associated with the network upgrade, the LEC is not required to obtain a franchise until and unless it proposes to offer cable services. For example, if a LEC deploys fiber optic cable that can be used for cable and non-cable services, this deployment alone does not trigger the obligation to obtain a cable franchise. The same is true for boxes housing infrastructure to be used for cable and non-cable services.

122. We further clarify that an LFA may not use its video franchising authority to attempt to regulate a LEC's entire network beyond the provision of cable services. We agree with Verizon that the "entirety of a telecommunications/data network is not automatically converted to a 'cable system' once subscribers start receiving video programming."[399] For instance, we find that the provision of video services pursuant to a cable franchise does not provide a basis for customer service regulation by local law or franchise agreement of a cable operator's entire network, or any services beyond cable services.[400] Local regulations that attempt to regulate any non-cable services offered by video providers are preempted because such regulation is beyond the scope of local franchising authority and is inconsistent with the definition of "cable system" in Section 602(7)(C).[401] This provision explicitly states that a common carrier facility subject to Title II is considered a cable system "to the extent such facility is used in the transmission of video programming . . . ."[402] As discussed above, revenues from non-cable services are not included in the base for calculation of franchise fees.

123. In response to requests that we address LFA authority to regulate "interactive on-demand services,"[403] we note that Section 602(7)(C) excludes from the definition of "cable system" a facility of a common carrier that is used solely to provide interactive on-demand services.[404] "Interactive on-demand services" are defined as "service[s] providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming

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(Continued from previous page)
operator to connect with the existing PEG feeds, with such costs borne by the OVS operator. 47 C.F.R. § 76.1505(d).

397 Veriwn Comments at 75.

398 ***See*** Verizon Comments at 21. ***See also*** South Slope Comments at 11; NCTA Comments at 12.

399 Verizon Comments at 83.

400 Veriwn Comments at 75.

401 47 U.S.C. § 522(7)(C). **See *also*** Veriwn Comments at 82-87.

402 47 U.S.C. § 522(7)(C).

403 ***See*** BellSouth at 42; NATOA Reply at 27-28.

404 47 U.S.C. § 522(7)(C).

prescheduled by the programming provider."[405] We do not address at this time what particular services may fall within the definition.

124. We note that this discussion does not address the regulatory classification of any particular video services being offered. We do not address in this ***Order*** whether video services provided over Internet Protocol are or are not "cable services."[406]

D. Preemption of Local Laws, Regulations **and** Requirements

125. Having established rules and guidance to implement Section 621(a)(1), we turn now to the question of local laws that may be inconsistent with our decision today. Because the rules we adopt represent a reasonable interpretation of relevant provisions in Title VI as well as a reasonable accommodation of the various policy interests that Congress entrusted to the Commission, they have preemptive effect pursuant to Section 636(c). Alternatively, local laws are impliedly preempted to the extent that they conflict with this ***Order*** or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[407]

126. At that outset of this discussion, it is important to reiterate that we do not preempt state law or state level franchising decisions in this *Order*.[408] Instead, we preempt only local laws, regulations, practices, and requirements to the extent that: (1) provisions in those laws, regulations, practices, and agreements conflict with the rules or guidance adopted in this ***Order;*** and (2) such provisions are not specifically authorized by state law. As noted above,[409] we conclude that the record before us does not provide sufficient information to make determinations with respect to franchising decisions where a state is involved, issuing franchises at the state level or enacting laws governing specific aspects of the franchising process. We expressly limit our findings and regulations in this ***Order*** to actions or inactions at the local level where a state has not circumscribed the LFA's authority. For example, in light of differences between the scope of franchises issued at the state level and those issued at the local level, it may be necessary to use different criteria for determining what may be unreasonable with respect to the key franchising issues addressed herein. We also recognize that many states only recently have enacted comprehensive franchise reform laws designed to facilitate competitive entry. In light of these facts, we lack a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises.

127. Section 636(c) of the Communications Act provides that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded."" In the Local ***Franchising NPRM***, the Commission tentatively concluded that, pursuant to the authority granted under Sections 621 and 636(c), and under the Supremacy Clause:" the Commission

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[405] 47 U.S.C. § 522(12)

[406] ***See IP-Enabled Services,*** 19 FCC Rcd 4863 (2004); Petition of SBC Communications Inc. for a Declaratory Ruling, WC Docket No. 04-36 (filed Feb. **5**, 2004); Letter from James C. Smith, Senior Vice President, **SBC** Services Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-36 (filed Sept. 14,2005).

[407] ***Florida Lime and Avocado Growers v. Paul,*** 373 US. 132, 142-43 (1963).

[408] *See* ***supra*** note 2.

[409] ***Id.***

[410] 47 U.S.C. § 556(c)

[411] U.S. Const., ***Art.*** VI, cl.2

may deem to be preempted any state or local law that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Title VI.[412] For example, we may deem preempted any local law that causes an unreasonable refusal to award a competitive franchise in violation of Section 621(a)(1).[413] Accordingly, the Commission sought comment on whether it would be appropriate to preempt state and local legislation to the extent we find that it serves as an unreasonable barrier to the grant of competitive franchises.

128. The doctrine of federal preemption arises from the Supremacy Clause, which provides that federal law is the "supreme Law of the Land."[414] Preemption analysis requires a statute-specific inquiry. There are various avenues by which state law may be superseded by federal law. We focus on the two which are most relevant here. First, preemption can occur where Congress expressly preempts state law.[415] When a federal statute contains an express preemption provision, the preemption analysis consists of identifying the scope of the subject matter expressly preempted and determining if a state's law falls within its scope.[416] Second, preemption can be implied and can occur where federal law conflicts with state law.[417] 'Courts have found implied "conflict preemption" where compliance with both state and federal law is impossible or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[418]

129. Applying these principles to this proceeding, we find that local franchising laws, regulations, and agreements are preempted to the extent they conflict with the rules we adopt in this *Order*. Section 636(c) expressly preempts state and local laws that are inconsistent with the Communications Act.[419] This provision precludes states and localities from acting in a manner inconsistent with the Commission's interpretations of Title VI so long as those interpretations are valid.[420] It is the Commission's job, in the first instance, to determine the scope of the subject matter expressly preempted by Section 636.[421] As noted elsewhere, we adopt the rules in this *Order* pursuant to our interpretation of Section 621(a)(1) and other relevant Title VI provisions in light of the twin congressional goals of promoting competition in the multichannel video marketplace and promoting broadband deployment.[422] These rules represent a reasonable interpretation of relevant provisions in Title VI as well as a reasonable accommodation of the various policy interests that Congress entrusted to the Commission. They therefore have preemptive effect pursuant to Section 636(c).

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[412] *Local Franchising NPRM*, 20 FCC Rcd at 18589.

[413] *Id*

[414] U.S. Const. *Art.* VI, cl. 2. *See also Hillsborough County, Florida v. Automated Med Labs., Inc.*, 471 U.S. 707, 712-13 (1985).

[415] *Cipollone v. Liggett Group, Inc.*, *505* U.S. 504, 517 (1992)

[416] *Id.* at 517

[417] *"'Florida Lime and Avocado Growers,* 373 U.S. at 142-43

[418] *Id.*

[419] 47 U.S.C. § 556(c).

[420] *See, e.g., Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216 (1st Cir. 2005) (finding municipal ordinances that imposed franchise fees on cable operators were preempted under Section 636(c) where inconsistent with Section 622 of the Communications Act).

[421] *See Cipollone, 505* U.S. at 517; *Capital Cities Cable,* 467 U.S. 691,699 (1984).

[422] *See supra* paras. 2-4, 61-64.

130. Alternatively, we find that such local laws, regulations, and agreements are impliedly preempted to the extent that they conflict with this ***Order*** or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of *Congress.*[423] Among the **stared** purposes of Title VI is to (1) "establish a national policy concerning cable communications," **(2)** "establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community," and **(3)** "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."[424] The legislative history to both the 1984 and 1992 Cable Acts identifies a national policy of encouraging competition in the multichannel video marketplace and recognizes the national implications that the local franchising process can have on that **policy.**[425] The national policy of promoting a competitive multichannel video marketplace has been repeatedly reemphasized by Congress, the Commission, and the **courts.**[426] The record here shows that the current operation of the franchising process at the local level conflicts with this national multichannel video policy by imposing substantial delays on competitive entry and requiring unduly burdensome conditions that deter **entry.**[427] And to the extent that local requirements result in LFAs unreasonably refusing to award competitive franchises, such mandates frustrate the policy goals underlying Title VI. The rules we adopt today, *e.g.*, limits on the time period for **LFA** action on competitive franchise applications,'" limits on LFA's ability to impose build-out **requirements,**[429] and limits on **LFA** collection of franchise fees,[430]

[423] ***Florida** Lime and Avocado **Growers,*** 373 U.S. at 142-43.

[424] 47 U.S.C. § 521 (1), (2) & (6).

[425] ***See*** H.R. REP. NO. 98-934, at 19 (1984), ***as reprinted in*** 1984 U.S.C.C.A.N. 4655,4656; S. REP. NO. 97-518, at 14 (1982) ("free and open competition in the marketplace" and the "elimination and prevention of artificial barriers to entry" are essential to the growth and development of the cable industry); H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), ***as reprinted in*** 1992 U.S.C.C.A.N. 1231, 1259-60.

[426] ***See, e.g.,*** 47 U.S.C. § 521(6) (stating that one of the purposes of Title **VI** is "to promote competition in cable communications"); *FCC v.* ***Beach Communications, Inc., 508*** U.S. 307,309 (1993) (recognizing "[o]ne objective of the Cable Act was to set out 'franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community."' (citing 47 U.S.C. § 521(2))).

[427] ***See,*** *e.g.,* AT&T Reply at 6-7 ("today's standardless franchising process, and the anticompetitive substantive conditions demanded of new entrants by many LFAs .. not only delay entry, but often prevent it altogether"); AT&T Comments at 43 (listing several conditions commonly imposed in the local franchising process that raise the cost of entry, deter broadband investment, and deny consumers the benefits of competition and choice); Verizon Comments at iv-vi (the franchising process ***is*** often marked hy inordinate delay and is often used by many LFAs "as an opportunity to demand all manner of additional concessions, mostly unrelated to the provision of video services or the underlying purposes of franchise requirements, from the would-be competitor"); TIA Comments at 7-15 (many LFAs unreasonably delay the grant of competitive franchises and demand excessive concessions from potential entrants); USTA Comments at 19-20 ("The single biggest obstacle to widespread competition in the video service market is the requirement that a provider obtain an individually negotiated local franchise in each area where it intends to provide service"); FTTH Council Comments at 59-60 ("the franchising process **as** implemented by numerous LFAs across *the* country continues ***to*** suffer from numerous flaws that *frustrate* ***the*** twin Congressional objectives of promoting cable competition and fostering deployment of advanced services to all Americans"); Alcatel Comments at 19 ("[t]he regulatory obstacle of thousands of local video franchises potentially wielding their authority to adopt unreasonable requirements will invariably impede deployment by competitors and negatively impact investment in advanced technologies and services").

[428] ***See*** supra Section III.C.1.

[429] ***See*** supra Section III.C.2.

[430] ***See*** supra Section III.C.3.

are designed to ensure efficiency and fairness in the local franchising process and to provide certainty to prospective marketplace participants. This, in *turn*, will allow **us** to effectuate Congress' twin goals of promoting cable competition and minimizing unnecessary and unduly burdensome regulation on cable systems. Thus, not only are Section 636(c)'s requirements for preemption satisfied, but preemption in these circumstances is proper pursuant to the Commission's judicially recognized ability, when acting pursuant to its delegated authority, to preempt local regulations that conflict with or stand as an obstacle to the accomplishment of federal objectives.[431]

131. We reject the claim by incumbent cable operators and franchising authorities that the Commission lacks authority to preempt local requirements because Congress has not explicitly granted the Commission the authority to preempt.[432] These commenters suggest that because the Commission seeks to preempt a power traditionally exercised by a state or local government (*i.e.*, local franchising), under the Fifth Circuit's decision in *City of Dallas*,[433] the Commission can only preempt where it is given express statutory authority to do so.[434] However, this argument ignores the plain language of Section 636(c), which states that "any provision of law of any State, political subdivision, or agency therefore, or franchising authority ... which is inconsistent with this chapter shall be deemed to be preempted and superseded."[435] Moreover, Section 621 expressly limits the authority of franchising authorities by prohibiting exclusive franchises and unreasonable refusals to award additional competitive franchises.[436] Congress could not have stated its intent to limit local franchising authority more clearly. These provisions therefore satisfy any express preemption requirement.[437]

132. Furthermore, as long as the Commission acts within the scope of its delegated authority in adopting rules that implement Title VI, including the prohibition of Section 621(a)(1), its rules have preemptive effect.[438] Courts assess whether an agency acted within the scope of its authority "without any presumption one way or the other"; there is no presumption against preemption in this context.[439] As noted above, Congress charged the Commission with the task of administering the Communications Act,

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[431] *See, e.g., Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 369 (1986)

[432] **See** Comcast Comments at 36-37; Comcast Reply at 35-37; Burnsville/Eagan Comments at 35-36

[433] *City of Dallas*, 165 F.3d at 341

[434] ***See*** Comcast Comments at 37; Comcast Reply at 36; Burnsville/Eagan Comments at 35-36.

[435] ***41*** U.S.C. § 556(c)

[436] 47 U.S.C. § 541(a)(1)

[437] *See Liberty Cablevision of Puerto Rico v. Municipality of Caguas*, 417 F.3d 216, 221 (1st Cir. 2005) (Section 636(c) makes clear that Congress "unmistakably" intended to preempt state and local franchising decisions that are inconsistent with the Act, including Section 621); *Qwest Broadband Services, Inc. v. City of Boulder*, 151 F. Supp. 2d. 1236, 1243 **(D.** Colo. 2001) (a franchise provision in the Boulder, Colorado charter was preempted by Section 621(a)(1) because it conflicted directly with that provision's mandate that the "franchising authority" be responsible **for** granting the franchise).

[438] *See City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof"); *Louisiana Public Serv. Comm.*, 476 U.S. at 369 ("a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation"); *Capital Cities Cable, Inc. v. Crisp*, 467 **U.S.** 691, 699 (1984) (when a federal agency promulgates regulations intended to preempt state law, courts uphold preemption **as** long **as** the agency's choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute"); *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153 ("Federal regulations have no less pre-emptive effect than federal statutes").

[439] *New York v. FERC*, 535 U.S. 1, 18 (2002)

including Title VI, and the Commission has clear authority to adopt rules implementing provisions such as Section 621.[440] Consequently, our rules preempt any contrary local regulations.[441]

133. We also find no merit in incumbent cable operators' and local franchising authorities' argument that the scope of the Commission's preemption authority under Section 636(c) is limited by the terms of Section 636(a) of the Act."' Section 636(a) provides that nothing in Title VI "shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this title."[443] The very reason for preemption in these circumstances is that many local franchising laws and practices are at odds with the express provisions of Title VI, as interpreted in this *Order*. Consequently, Section 636(a) presents no obstacle to preemption here. We therefore need not decide whether the state and local laws at issue relate to "matters of public health, safety, and welfare" within the meaning of Section 636(a).

134. We also reject the franchising authorities' argument that any attempt to preempt lawful local government control of public rights-of-way by interfering with local franchising requirements, procedures and processes could constitute an unconstitutional taking under the Fifth Amendment of the United States Constitution."' The "takings" clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."[445] We conclude that our actions here do not run afoul of the Fifth Amendment for several reasons. To begin with, our actions do not result in a Fifth Amendment taking. Courts have held that municipalities generally do not have a compensable "ownership" interest in public rights-of-way,[446] but rather hold the public streets and sidewalks in trust for the public."' As one court explained, "municipalities generally possess no rights to profit from their streets unless specifically authorized by the state."[448] Also, we note that

[440] *See supra* paras. 53-64.

[441] *See Fidelity Federal Savings & Loan Assn. v. De la Cuesta,* 458 U.S. 141, 153-58 (1982); *City of New York,* 486 U.S. at 64. *See also* AT&T Comments at 41-42.

[442] *See* Comcast Comments at 39 (citing 47 U.S.C. § 556(a)). *See also* Florida Municipalities Comments at 18-19 (the Cable Act provides for limited preemption of local regulatory efforts in certain specific areas, none of which cover competitive franchises). Commenters further point to the legislative history for Section 636(a), which noted that a state may "exercise authority over the whole range of cable activities, such as negotiations with cable operators; consumer protection; construction requirements; rate regulation or deregulation; the assessment of financial qualifications; the provision of technical assistance with respect to cable; and other franchise-related issues – as long as the exercise of that authority is consistent with Title VI." *See* Comcast Comments at 39-40 (citing H.R REP. No. 98-934, at 94 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655,4731).

[443] 47 U.S.C. § 556(a) (emphasis added).

[444] *See* Texas Coalition of Cities Comments at 29-35; Burnsville/Eagan Comments at 38. Burnsville/Eagan further argues that Fifth Amendment concerns would arise if the Commission were to interfere with the terms under which a competitive franchise is granted, thereby forcing modifications to existing cable franchises, pursuant to state and local level-playing-field requirements, thus depriving LFAs of lawful and reasonable compensation they negotiated with the incumbent cable operators for the use of public rights-of-way.

[445] U.S. Const. Amend. V.

[446] *See Liberty Cablevision,* 417 F.3d at 222.

[441] *See New Jersey Payphone Ass'n, Inc. v. Town of West New York,* 130 F.Supp.2d 631,638 (D.N.J. 2001); *see also Liberty Cablevision,* 417 F.3d at 222 (recognizing that it is "'a mistake to suppose ... [that] the city is constitutionally and necessarily entitled to compensation"' for use of the city streets).

[448] *See Liberty Cablevision,* 417 F.3d at 222.

telecommunications carriers that seek to offer video service already have an independent right under state law to occupy rights-of-way.[449] States have granted franchises to telecommunications carriers, pursuant to which the carriers lawfully occupy public rights-of-way for the purpose of providing telecommunications service.[450] Because all municipal power is derived from the state,[451] courts have held that "a state can take public rights-of-way without compensating the municipality within which they are located."[452] Given the municipality is not entitled to compensation when its interest in the streets are taken pursuant to state law, it is difficult to see how the transmission of additional video signals along those same lines results in any physical occupation of public rights-of-way beyond that already permitted by the states.[453]

135. Moreover, even if there was a taking, Congress provided for "just compensation" to the local franchising authorities.[454] Section 622(h)(2) of the Act provides that a local franchising authority may recover a franchise fee of up to 5 percent of a cable operator's annual gross revenue.[455] Congress enacted the cable franchise fee as the consideration given in exchange for the right to use the public ways.[456] The implementing regulations we adopt today do not eviscerate the ability of local authorities to impose a franchise fee. Rather, our actions here simply ensure that the local franchising authority does not impose an excessive fee or other unreasonable costs in violation of the express statutory provisions and policy goals encompassed in Title VI.[457]

136. Finally, LFAs maintain that the Commission's preemption of local governmental powers offends the Tenth Amendment of the U.S. Constitution.[458] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[459] In support of their position, commenters argue

[449] *See* Verizon Reply at 25

[450] *See* Verizon Reply at 25; South Slope Comments at 10-11; NCTA Comments at 12.

[451] *See St. Louis v. Western Union Telegraph* Co., 149 U.S. 465,467 (1893); *Liberty Cablevision*, 417 F.3d at 221

[452] *See City & County of Denver*, 18 P.3d 748, 761 (Colo. 2001)

[453] *See* Verizon Reply at 25-26. *See also C/R TV, Inc. v. Shannondale, Inc.*, 27 F.3d 104, 109 (4th Cir. 1994) (reasoning that the transmission of cable television signals "would not impose an additional burden on [a] servient estate" on which telephone poles, power lines, and telephone wires had previously been installed).

[454] *See US. v. Riverside Bayview Homes*, 474 U.S. 121, 128 (1985) (the Fifth Amendment does not prohibit takings, only uncompensated ones). Because we find that the statute provides just compensation, we need not address whether the takings clause of the Fifth Amendment encompasses the property interests of state and local governments in the same way that it applies to the property interests of private persons.

[455] 47 U.S.C. § 542(h)(2).

[456] In passing the 1984 Cable Act, Congress recognized local government's entitlement to "assess the cable operator a fee for the operator's use of public ways," and established "the authority of a city to collect a franchise fee of up to 5 percent of an operator's annual gross revenues." H.R. REP. NO. 98-934, at 26 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4663.

[457] For the reasons stated above, we need not reach the issue of whether a "taking" has occurred with respect to a competitive applicant providing cable service over the same network it uses to provide telephone service, for which it is already authorized by the local government to use the public rights-of-way.

[458] *See* Michigan Municipal League Comments at 24 ("[a]ny action by the Commission to mandate the granting of a franchise directly or by means of state actions in favor of any party over the objection of the local franchising authority offends the Tenth Amendment of the U.S. Constitution"); Anne Arundel County Comments at 50 (same).

[459] U.S. Const. Amend. X

that the Commission is improperly attempting to override local government's duty to "maximize the value of local property for the greater good by imposing a federal regulatory scheme onto the states and/or local governments.[460] Contrary to the local franchising authorities' claim, however, they have failed to demonstrate any violation of the Tenth Amendment.[461] "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."[462] Thus, when Congress acts within the scope of its authority under the Commerce Clause, no Tenth Amendment issue arises.[463] Regulation of cable services is well within Congress' authority under the Commerce Clause.[464] Thus, because our authority in this area derives from a proper exercise of congressional power, the Tenth Amendment poses no obstacle to our preemption of state and local franchise law or practices.[465] Likewise, there is no merit to LFA commenters' suggestion that Commission regulation of the franchising process would constitute an improper "commandeering" of state governmental power.[466] The Supreme Court has recognized that "where Congress has the authority to regulate private activity under the Commerce Clause," Congress has the "power to offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation."[467] And here, we are simply requiring local franchising authorities to exercise their regulatory authority according to federal standards, or else local requirements will be preempted. For all of these reasons, our actions today do not offend the Tenth Amendment.

137. We do not purport to identify every local requirement that this ***Order*** preempts. Rather, in accordance with Section 636(c), we merely find that local laws, regulations and, agreements are preempted to the extent they conflict with this ***Order*** and the rules adopted herein. For example, local laws would be preempted if they: (1) authorize a local franchising authority to take longer than **90** days to act on a competitive franchise application concerning entities with existing authority to access public rights-of-way, and six months concerning entities that do not have authority to access public rights-of-way;[468] (2) allow an LFA to impose unreasonable build-out requirements on competitive franchise applicants;[469] or (3) authorize or require a local franchising authority to collect franchise fees in excess of the fees authorized by law.[470]

138. One specific example of the type of local laws that this ***Order*** preempts are so-called "level-playing-field" requirements that have been adopted by a number of local authorities.[471] We find

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[460] ***See*** Michigan Municipal League Comments at 25; Anne Arundel County Comments at 51.

[461] ***See*** Verizon Reply at 27-29.

[462] *See New York v. US.*, **505U.S.**144, 156 (1992).

[463] ***See*** *id* at 157-58.

[464] ***See Crisp,*** 467 U.S. at 700-701 (holding that cable services are interstate services).

[465] ***See*** *Qwest* ***Broadband Services,*** *Inc.* ***v. City of Boulder,*** 151 F.Supp.2d 1236, 1245 ("the inquiries under the Commerce Clause and the Tenth Amendment are mirror images, and a holding that a Congressional enactment does not violate the Commerce Clause is dispositive of a Tenth Amendment challenge) (citing *United States* ***v. Baer,*** 235 F.3d 561, 563 n.6 (10th Cir. 2000). ***See also*** Verizon Reply at 28.

[466] ***See*** Michigan Municipal League Comments at 25; Anne Arundel County Comments at 51

[467] ***See*** *New York* ***v. US.,505*** US. at 161.

[468] ***See supra*** at Section III.C.1

[469] ***See supra*** at Section III.C.2.

[470] ***See supra*** at Section III.C.3.

[471] ***See,*** *e.g.*, GMTC Comments at 15.

that these mandates unreasonably impede competitive entry into the multichannel video marketplace hy requiring LFAs to grant franchises to competitors on substantially the same terms imposed on the incumbent cable operators.[472] As an initial matter, just because an incumbent cable operator may agree to franchise terms that are inconsistent with provisions in Title VI, LFAs may not require new entrants to agree to such unlawful terms pursuant to level-playing-field mandates because any such requirement would conflict with Title VI. Moreover, the record demonstrates that aside from this specific scenario, level-playing-field mandates imposed at the local level deter competition in a more fundamental manner. The record indicates that in today's market, new entrants face "steep economic challenges" in an "industry characterized by large fixed and *sunk* costs," without the resulting benefits incumbent cable operators enjoyed for years as monopolists in the video services marketplace."' According to commenters, "a competitive video provider who enters the market today is in a fundamentally different situation" from that of the incumbent cable operator: "[w]hen incumbents installed their systems, they had a captive market," whereas new entrants "have to 'win' every customer from the incumbent" and thus do not have "anywhere near the number of subscribers over which to spread the costs."[474] Commenters explain that "unlike the incumbents who were able to pay for any of the concessions that they grant an LFA out of the supra-competitive revenue from their on-going operations," "new entrants have no assured market position."[475] Based on the record before us, we thus find that an LFAs refusal to award an additional competitive franchise unless the competitive applicant meets substantially all the terms and

[412] ***See*** FTTH Council Comments at **28-31** ("there is substantial evidence that level playing field requirements have harmed new entrants or simply scared off applicants in the first place"); Verizon Comments at **76-80** (level-playing-field provisions are "protectionist requirements" for the benefit of the incumbent cable operator and are often cited as a basis for imposing all manner of additional costs and obligations, many of which are unreasonable and/or unlawful, on a would-be new entrant into the market); USTA Reply at **23-26, 32-34** (level-playing-field laws intrinsically limit the ability of LFAs to award franchises); ***see also,*** GAO Report, ***Wire-Based Competition Benefited Consumers in Selected Markets*** (Feb. 2004), **GAO-04-241** Report at **21** (noting that one local official indicated that the level-playing-field law in his state was a factor in an interested competitive cable company's retracting a cable application); BSPA Comments at **4-5** (level-playing-field statutes are a superficial appeal to fairness that masks the real intent to protect the incumbent's market position, and such requirements delay or limit the growth of competition by negatively impacting the availability **or** use of capital); Letter from Lawrence Spiwak, President, Phoenix Ctr. For Advanced Legal and Econ. Pub. Policy Studies, to Marlene Dortch, Secretary, Federal Communications Commission at Attachment, ***Phoenix Center Policy Paper Number 21: Competition After Unbundling: Entry, Industry Structure and Convergence,*** 37 ("presence of a 'first mover' advantage means that requiring a new entrant to bear an entry cost simply because the incumbent cable operator has already borne it will have the effect of deterring entry substantially, even if such costs did not deter the incumbent cable operator from offering service") (March **13, 2006) *("Phoenix Center Competition Paper"*); DOJ ***Ex Parte*** at **16.** ***But see*** Comcast Comments at **40** (maintaining that state level-playing-field statutes are a legitimate and well-established exercise of state and local regulatory authority and are not inconsistent with the Communications Act); NATOA Reply at **43-44** (maintainiig that there is little or no evidence to suggest that state level-playing-field laws have had anywhere near the draconian effect on the granting of competitive franchises as the telephone industry alleges).

[473] ***See*** USTA Reply at **24.** ***See*** *also,* Verizon Reply at ***65*** ("In exchange for the costs they incurred to enter the market, the incumbent cable operators generally received exclusive franchises and enjoyed all of the benefits of being monopoly providers for years, often decades."); Mercatus Comments at 40 ("while a second cable operator will have to make the same unrecoverable investment previously made by the incumbent, it will not have the benefit of a monopoly over which to amortize it"); FTTH Council Comments at **3** ("New entrants are highly unlikely to ever obtain and enjoy the fruits of market power. Consequently, the burdens of the pre-existing franchisingprocess from the perspective of these new entrants are not offset by the benefits that the monopolists enjoyed.").

[474] ***See*** FTTH Council Comments at **30** (quoting Andy Sarwal Declaration, para. 7); Verizon Comments at 77 (new entrants "[face] ubiquitous competition from strong and entrenched competitors, which in turn leads to lower market share and lower profit margins").

[475] ***See*** Verizon Reply at **65.** ***See*** *also* USTA Reply at **24.**

conditions imposed on the incumbent cable operator may be unreasonable, and inconsistent with the "unreasonable refusal" prohibition of Section 621(a)(1). Accordingly, to the extent a locally-mandated level-playing-field requirement is inconsistent with the rules, guidance, and findings adopted in this ***Order,*** such requirement is deemed preempted.[476]

N. FURTHER NOTICE OF PROPOSED RULEMAKING

139. As discussed above, this proceeding is limited to competitive applicants under Section 621(a)(1).[477] Yet, some of the decisions in this ***Order*** also appear germane to existing franchisees. We asked in the ***Local Franchising NPRM*** whether current procedures and requirements were appropriate for any cable operator, including existing operators.[478] NCTA argues that if the Commission establishes franchising relief for new entrants, we should do the same for incumbent cable operators because imposing similar franchising requirements on new entrants and incumbent cable operators promotes competition.[479] Somewhat analogously, the BSPA argues that any new franchise regulatory relief should extend to all current competitive operators and new entrants equally; otherwise, the inequities would effectively penalize existing competitive franchisees simply because they were the first to risk competition with the incumbent cable operator.[480] The record does not indicate any opposition by new entrants to the idea that any relief afforded them also be afforded to incumbent cable operators.[481] Some incumbent cable operators discussed the potential impact of Commission action under Section **621** on incumbent cable operators. For example, Charter argues that granting competitive cable providers entry free from local franchise requirements would affect Charter's ability to satisfy its existing obligations; funds that Charter might use to respond to competition by investing in new facilities and services would instead be tied up in franchise obligations not imposed on Charter's competitors, which would undermine the company's investment and render its franchise obligations commercially impracticable.[482] AT&T

[476] We also find troubling the record evidence that suggests incumbent cable operators use "level-playing-field" requirements to frustrate negotiations between LFAs and competitive providers, causing delay and preventing competitive entry. ***See, e.g.,*** Letter from John Goodman, Broadband Service Providers Association, to Marlene Dortch, Secretary, Federal Communications Commission (March 3, 2006) (explaining that the incumbent cable operator used level-playing-field requirements to bring litigation against the LFA which delayed the negotiation process and made entry so expensive that it no longer became feasible for the new entrant); Texas Coalition of Cities Comments at 13 ("Most delays in ***competitive franchise*** negotiations result from the incumbent cable provider's demands that competitive providers' franchises contain virtually identical terms."); Verizon Reply at 65-66 ("incumbents' over-eagerness to support these anticompetitive requirements further evidences the need for the Commission to remove this roadblock to competition").

[477] ***See supra paras.*** 1, 113.

[478] ***Local Franchising*** NPRM, 20 FCC Rcd at 18588.

[479] NCTA Comments at 13 (quoting ***Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities***, 20 FCC Rcd 14853, 14855-56, 14864-65 (2005) "[T]reating like services alike promotes competition" by allowing the market to determine the better operator rather than providing one operator "artificial regulatory advantages"). ***See also*** Cox Reply at 2-4.

[480] BSPA Comments at 2-3.

[481] *See, e.g.*, BSPA Comments at 2-3 (any new regulatory relief in franchising should apply to all current competitive operators and potential new entrants). ***But see*** FTM Council Comments at 24 (new entrants are not treated more favorably than incumbents when they are burdened with the same requirements as incumbents but do not have the same market power).

[482] Charter Comments at 3-4.

argues that competition will not harm incumbent cable operators: cable has handled the competition that DBS presents, and analysts predict that the new wave of competition will not put them out of business.[483]

140. We tentatively conclude that the findings in this ***Order*** should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs. We note that Section 611(a) states "A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use" and Section 622(a) provides "any cable operator may be required under the terms of any franchise to pay a franchise fee." These statutory provisions do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants. We seek comment on our tentative conclusion. We also seek comment on our authority to implement this finding. We also seek comment on what effect, if any, the findings in this ***Order*** have on most favored nation clauses that may be included in existing franchises. The Commission will conclude this rulemaking and release an order no later than six months after release of this ***Order.***

141. In the ***Local Franchising NPRM***, we also sought comment on whether customer service requirements should vary greatly from jurisdiction to jurisdiction.[484] In response, AT&T urges us to adopt rules to prevent LFAs from imposing various data collection and related requirements in exchange for a franchise.[485] AT&T claims that LFAs have imposed obligations that franchisees collect, track, and report customer service performance data for individual franchise areas.[486] AT&T states that it operates its call centers and systems on a region-wide basis, and that it is not currently possible or economically feasible for AT&T to comply with the various local customer service requirements on a franchise by franchise basis.[487] AT&T also asks us to affirm that LFAs may not, absent the franchise applicant's consent, impose any local service quality standards that go beyond the requirements of duly enacted laws and ordinances.[488] Verizon indicates that some localities have conditioned the grant of a franchise upon the submission of Verizon's data services to local customer service regulation.[489]

142. NATOA opposes AT&T's request for relief from local customer service standards, and argues that the Act and the Commission's rules explicitly provide for local customer service regulation.[490] Specifically, NATOA asserts that Section 632(d)(2) of the Cable Act allows for the establishment and enforcement of local customer service laws that go beyond the federal standards.[491] Other parties assert that customer service regulation is necessary to ensure that consumers have regulatory relief.[492]

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[483] AT&T Reply at 5.

[484] *Local* Franchising ***NPRM***, 20 FCC Rcd at 18588.

[485] AT&T Comments at 72-73,

[486] ***Id.***

[487] ***Id*** As discussed in Section III.C.2 above, AT&T's existing call center regions do not mirror local franchise areas. One region can encompass multiple franchise areas, and impose a multitude of regulations upon a new entrant.

[488] AT&T Comments at 73

[489] Verizon Comments at 75

[490] NATOA Reply at 40-41. ***See*** *also* New York City Comments at 3 (citing 47 U.S.C. § *552).*

[491] 47 U.S.C. § 552(d)(2). Accord 47 C.F.R. § 76.309(b)(4).

[492] ***See, e.g.,*** Alliance for Public Technology Comments at 2-3; American Association of People with Disabilities at ***2;*** Cavalier Comments at ***6.***

143. Section 632(d)(2) states that:

> [n]othing in this Section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission . . . . Nothing in this Title shall be construed to prevent the establishment and enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.[493]

Given this explicit statutory language, we tentatively conclude that we cannot preempt state or local customer service laws that exceed the Commission's standards, nor can we prevent LFAs and cable operators from agreeing to more stringent standards. We seek comment on this tentative conclusion.

V. PROCEDURAL MATTERS

144. ***Ex Parte Rules.*** This is a permit-but-disclose notice and comment rulemaking proceeding. Ex Parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. ***See generally*** 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

145. ***Comment Information.*** Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on or before ***30*** days after this ***Further Notice of Proposed Rulemaking*** is published in the Federal Register, and reply comments on or before 45 days of publication. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or **(3)** by filing paper copies. ***See Electronic Filing of Documents in Rulemaking Proceedings, 63*** FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

  - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in

[493] *47* U.S.C. § 552(d)(2). ***Accord47*** C.F.R. § 76.309(b)(4).

receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12" Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

146. ***Initial Paperwork Reduction Act Analysis.*** This ***Further Notice of Proposed Rulemaking*** does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, ***see*** 44 U.S.C. 3506(c)(4).

147. ***Initial Regulatory Flexibilify Analysis.*** As required by the Regulatory Flexibility Act,[494] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial ***number*** of small entities of the proposals addressed in this ***Further Notice of Proposed Rulemaking.*** The IRFA is set forth in Appendix C. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the ***Second Further Notice,*** and they should have a separate and distinct heading designating them as responses to the IRFA.

148. ***Paperwork Reduction Act Analysis.*** This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we will seek specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

149. In this present document, we have assessed the effects of the application filing requirements used to calculate the time frame in which a local franchising authority shall make a decision, and find that those requirements will benefit companies with fewer than 25 employees by providing such companies with specific application requirements of a reasonable length. We anticipate this specificity will streamline this process for companies with fewer than 25 employees, and that these requirements will not burden those companies.

[494] ***See*** **5 U.S.C. § *603.***

150. ***Final Regulatory Flexibility Analysis*** As required by the Regulatory Flexibility Act,[495] the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA) relating to this ***Report and Order and Further Notice of Proposed Rulemaking.*** The FRFA is set forth in Appendix D.

151. ***Congressional Review Act.*** The Commission will send a copy of this ***Report and Order and Further Notice of Proposed Rulemaking*** in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

152. ***Additional Information.*** For additional information on this proceeding, please contact Holly Saurer, Media Bureau at (202) 418-2120, or Brendan Murray, Policy Division, Media Bureau at (202) 418-2120.

VI. ORDERING CLAUSES

153. IT IS ORDERED that, pursuant to the authority contained in Sections 1, 2, 4(i), 303, 303r, 403 and 405 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 303(r), 403 , this ***Report and Order and Further Notice of Proposed Rulemaking*** IS ADOPTED.

154. IT IS FURTHER ORDERED that pursuant to the authority contained in Sections Sections 1, 2, 4(i), 303, 303a, 303b, and 307 of the Communications Act of 1934, 47 U.S.C §§ 151, 152, 154(i), 303, 303a, 303b, and 307, the Commission's rules ARE HEREBY AMENDED as set forth in Appendix B. It is our intention in adopting these rule changes that, if any provision of the rules is held invalid by any court of competent jurisdiction, the remaining provisions shall remain in effect to the fullest extent permitted by law.

155. IT IS FURTHER ORDERED that the rules contained herein SHALL BE EFFECTIVE 30 days after publication of the ***Repori and Order and Further Notice of Proposed Rulemaking*** in the Federal Register, except for the rules that contain information collection requirements subject to the Paperwork Reduction Act, which shall become effective immediately upon announcement in the Federal Register of OMB approval.

156. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this ***Report and Order and Further Notice of Proposed Rulemaking***, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

157. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this ***Report and Order and Further Notice of Proposed Rulemaking*** in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[495] *See 5* **U.S.C** § 604

APPENDIX A

List of Commenters and Reply Commenters

1. Abilene, TX
2. Access Channel 5, NY
3. Access Fort Wayne, IN
4. Access Sacramento, CA
5. Ad Hoc Telecom Manufacturer Coalition
6. Ada Township, et al.
7. Advance/Newhouse Communications
8. AEI-Brookings Joint Center for Regulatory Studies
9. Alamance County, NC
10. Albuquerque, NM
11. Alcatel
12. Alhambra, CA
13. Alliance for Public Technology
14. Alpina, MI
15. American Association of Business Persons with Disabilities
16. American Association of People with Disabilities
17. American Cable Association
18. American Consumer Institute
19. American Corn Growers Association
20. American Homeowners Grassroots Alliance
21. Anaheim, CA
22. Angels Camp, CA
23. Anne Arundel County, Carroll County, Charles County, Howard County and Montgomery County
24. Apex, NC
25. Apple Valley, MN
26. Appleton, WI
27. Archdale, NC
28. Arlington Independent Media, VA
29. Asheboro, NC
30. Ashland, KY
31. Ashokie, NC
32. Association of Independent Programming Networks
33. AT&T Inc.
34. Atascadero, CA
35. Bailey, NC
36. Banning, CA
37. Barrington, IL
38. Bellefonte, PA
39. Bellflower, CA
40. BellSouth
41. Benson, NC
42. Berks Community TV, PA
43. Beverly Hills, CA
44. Biddeford, ME
45. Billerica Access TV, MA
46. Billerica, MA
47. Birmingham Area Cable Board, MI

48. Blue Lake, CA
49. Bonita Springs, FL
50. Boston Community Access and Programming Foundation (BCAPF)
51. Boston, MA
82. Bowie, MD
83. Branford Commun. TV, CT
54. Brea, CA
85. Brisbane, CA
56. Broadband Service Providers Association
57. Brunswick, **ME**
58. Bucks County Consortium of Communities, PA
59. Burlington, NC
60. Burnsville/Eagan Telecommunications Commission; The City of Minneapolis, MN; The North Metro Telecommunications Commission; The North Suburban Communications Commission; and The South Washington County Telecommunications Commission ("City **of** Minneapolis")
61. Cable Access St. Paul, MN
62. Cable Advisory Council of South Central CT
63. Cablevision Systems Corporation
64. Cadillac, MI
65. Calabash, NC
66. California Alliance for Consumer Protection
67. California Farmers Union
68. California Small Business Association
69. California Small Business Roundtable
70. Cambridge Public Access Corp, MA
71. Cambridge, MA
72. Campbell County Cable Board, KY
73. Cape Coral, FL
74. Capital Community TV, OR
78. Carlsbad, CA
76. Carrboro, NC
77. Cary, NC
78. Castalia, NC
79. Caswell County, NC
80. Cavalier Telephone, LLC/Cavalier IP TV, LLC
81. Cedar Rapids, Iowa
82. Center for Digital Democracy
83. Central St. Croix Valley Joint Cable Comm, MN
84. Certain Florida Municipalities
88. Champaign, IL
86. Champaign-Urbana Cable TV and Telecomm Commission, IL
87. Chapel Hill, NC
88. Charlotte, NC
89. Charter Communications, Inc.
90. Chicago Access Corp, IL
91. Chicago, IL
92. Cincinnati Bell, Inc.
93. Cincinnati, OH
94. Citizen's Community TV, CO
95. City and County of San Francisco, CA
96. City of Los Angeles

97. City of Philadelphia
98. City of St. Louis, Missouri
99. City of Ventura, California
100. Clackamas County, OR
101. Clark County, NV
102. Clay County, FL
103. Clayton, NC
104. Clinton Township, MI
105. Clovis, CA
106. College Twp, PA
107. Comcast Corporation
108. Communications Support Group, Inc.
109. Community Access TV, IL
110. Community Programming Board of Forest Park et al, OH
111. Concord, CA
112. Concord, NC
113. Consumer Coalition of California
114. Consumer Electronics Association
115. Consumers First
116. Consumers **for** Cable Choice
117 Coral Springs, Florida
118 Coralville, IA
119 Coronado, CA
120 Cox Communications, Inc.
121 Cypress, CA
122 Daly City, CA
123 Dare County, NC
124 Darlington, SC
125 Davis, CA
126 Del Mar, CA
127 Delray Beach, FL
128. Democratic Processes Center
129. Discovery Institute's Technology & Democracy Project
130. Dortches, NC
131. Dublin, CA
132. Durham, NC
133. Eden, NC
134. El Cerrito, CA
135. Elk Grove, IL
136. Elon, NC*
137. Enumclaw, WA
138. Escondido, CA
139. Esopus, NY
140. Evanston, IL
141. Fairfax Cable Access, VA
142. Fairfax County, Virginia
143. Fairfax, CA
144. Faith, NC
145. Fall River Community TV, MA
146. Fargo, ND
147. Farmington, MN